

October 18, 2011

**via Electronic Filing (ECFS)**

The Honorable Julius Genachowski  
The Honorable Michael J. Copps  
The Honorable Robert M. McDowell  
The Honorable Mignon Clyburn  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: ***Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-154.***

Dear Chairman Genachowski and Commissioners:

Founded in 1981 by Mother Mary Angelica of the Poor Clare Nuns of Perpetual Adoration, EWTN is celebrating 30 years as a non-profit 501(c)3 charity that provides independent public interest programming comprised of religious, family, and spiritual content as well as live coverage of special events occurring worldwide. EWTN currently offers three 24 hour television services in the United States.

Consistent with its charitable mission, EWTN provides its programming free of charge, without commercial advertising and without fees, through all current multichannel video programming distribution methods that the rapid advances of technology have brought. Recognizing the value to its charitable mission and the convenience to the public, EWTN has embraced delivery of online video, including operating a channel on YouTube, providing direct access to selections of video programming on its own website(s), and generally exploring this unfolding means of program distribution. Moreover, EWTN has supported MVPD efforts to supply parallel delivery methods to their customers, including authorization of TV Everywhere IP delivery advanced by many MVPDs.

Online video delivery presents new challenges to non-profit, free to distribute programmers, however. Unlike traditional distribution where infrastructure costs can be fixed, online distribution presents per-viewer per-time costs. Similar to its traditional cable and MVPD distribution, EWTN distributes its online programming without charge or fee. Doing so is consistent with EWTN's mission, but presents unbounded distribution costs as the bandwidth and processing of transmitting the programming is now incurred per demand. Thus, on the balance of burdens, because online distribution is even more difficult for non-profit programmers, the burdens placed on them should be proportionally less than in traditional distribution.

**Protect Voluntary Closed Captioning by Programmers Exempt under Section 79.1(d) 11 and/or 12 by Duplicating these Categorical Exemptions in the New Rule**

Programmers exempt under Section 79.1(d)12 should be similarly exempt under the new rules, too, so that they may voluntarily provide closed captioning without waiving their exemption. Throughout the NPRM, the phrase “economic burden” is used consistently. Section 79.1(d) contains two tests of economic burden that are self-implementing, and have worked very well. Section 79.1(d)11 exempts closed captioning where the cost exceeds 2% of the revenues and 79.1(d)12 exempts closed captioning where the channel revenues are less than \$3,000,000. The NPRM falsely assumes that a channel exempt under Section 79.1(d)12 does not contain closed captioning when it states:

*[I]t seems the inclusion of the previous categorical exemptions in our new rules would generally be duplicative. In other words, if a program is not captioned on television because it is subject to one of the existing categorical exemptions, then it will not be required to be captioned when delivered via IP.*

NPRM FCC MB 11-154 at ¶ 32. The assumption of the NPRM is that the categorical exemptions are for individual programs. Yet, Section 79.1(d)12 is a blanket exemption for a programmer, and it is a bright line test of whether the closed captioning rules present an economic burden.

Under the old rule, programmers exempt under Sec. 79.1(d)12 are able to provide closed captioning on their programming and maintain their blanket exemption. This self implementing exemption has worked so well because the programmer does not need to petition and can still elect to provide closed captioning without being subject to administrative and economic burdens. Thus, under Section 79.1(d)11 and 12, voluntary closed captioning is promoted to more programmers.

In order to maintain this incentive for programmers to voluntarily provide closed captioning while maintaining exemption, Section 202 of the proposed rule should be modified to duplicate the self implementing exemptions provided in Section 79.1(d)11 and 12. Otherwise, programmers exempt under the old rules may remove voluntary closed captioning from television and online in order to remain exempt. Or, an exempt programmer may refuse to put televised programs that had closed captioning online because it is not exempt. Nobody wants that result. Instead, the exemption should be uniform across all media so that the voluntarily closed captioned material may be distributed as broadly as the programmer can manage. Thus, a programmer exempt under 79.1(d)12 should remain exempt for all video delivered by IP.

Section 202 should also be modified to accommodate the distribution downstream of the programmer to ensure that once closed captioning is provided, it must be passed through to the consumer. However, when programming televised on a channel exempt under Section 79.1(d)12 is placed online, a method of providing the blanket exemption should be provided so that the exempt programmer is not saddled with the burden of proving exemption for each program. Again, the new rule must accommodate the method of self implementing exemption that has worked so well under the old rule. If it does not do so, exempt programmers will refuse to make closed captioned material available online because doing so defeats the purpose of their exemption.

### **On Defining VPO, VPD, and VPP**

Regarding the proposed definitions of VPD, VPP, and VPO, the NPRM suggests, at ¶ 15, that VPD and VPP are to be defined as the same. Both with respect to the voluntary captioning, and with respect to certain distribution scenarios, this proposal may not make sense in practice. Consider MVPD initiatives that are providing IP video delivery to consumers entirely transcoded and delivered from the MVPD headend. Many of these MVPDs are undertaking IP video delivery (such as TV Everywhere and similar programs) as part of their consumer services and without further interaction from the programmer. In the instance where the programmer is televising acquired programming, it is not the VPO, but VPP. The MVPD is the VPD, but yet the programmer may be exempt. The definitions should permit the exempt programmer to remain exempt in this scenario and all matters of complying with the proposed rules remain with the MVPD. Adequately providing these exemptions will prevent exempt programmers from deauthorizing TV Everywhere and similar services thereby preserving a greater reach of voluntarily closed captioned programming.

### **Online video made available by consumers or the public**

The NPRM should recognize that fans of a programmer may take clips, segments, or other programming and make it available online. In this case, the VPP is acting without knowledge of the VPO. Some such uses may be fair use, others may occur prior to the VPO being able to police the availability. Certainly in the case of a programmer exempt under 79.1(d)12 and a non-profit charity, there may be reasons consistent with the charitable purpose of the entity, or merely a matter of budget constraints, that the VPO doesn't take down these uses as quickly as a commercial programmer would. The NPRM should recognize that the VPP may be unauthorized, or permitted by fair use, but at the same time leave the otherwise exempt VPO free from liability.

### **Technical Standards**

Section 203 should not require an exemption to be placed with every online video unless it is as simple as marking metadata. Even if it is so simple, a programmer exempt under Section 79.1(d)12 should be exempt from the requirement in favor of providing a periodic blanket exemption notice, preferably annually, but no more frequently than quarterly. Otherwise, the programmer is again deterred from circulating exempt programming online, with or without closed captioning.

### **Conclusion**

As it stated in its reply comment to the Implementation of Section 305 of the Telecommunications Act of 1996, MM Docket No. 95-176, EWTN supports the notion of increasing accessibility of programming to the hearing impaired through closed captioning. However, the instant proposed rule presents significant serious economic consequences for EWTN and for other non-profit networks by not incorporating

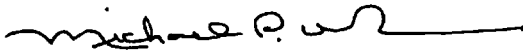
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Section 79.1(d)11 and 12. Without adjusting the proposed rule as stated herein, EWTN and other programmers will likely be faced with decisions of removing programming from online distribution, or removing closed captioning from televised programming in order to provide the same online. That's not an outcome EWTN or anybody else wants, because there should be accessibility across all media, while at the same time preserving the self implementing exemptions that have worked so well since the inception of the closed captioning rules.

Respectfully submitted,  
**ETERNAL WORD TELEVISION NETWORK, INC.**

A handwritten signature in black ink, appearing to read "Michael P. Warsaw", with a stylized flourish at the end.

Michael P. Warsaw  
President & Chief Executive Officer